



INCIDENTS INVOLVING THE 1992 FUND

PRESTIGE

Note by the Director

Summary:

The total claims arising from the *Prestige* incident may be as high as €1 050 million (£720 million), whereas the total amount of compensation available is €71.5 million (£118 million). In view of the remaining uncertainty as to the level of the admissible claims the Director feels unable to propose at this stage to increase the level of payments beyond the one applicable at present, ie 15%.

Since this level of payments is manifestly unsatisfactory for claimants, the delegations of France, Portugal and Spain have, together with the Director, explored whether it would be possible to find an innovative approach which would enable the 1992 Fund to increase the level of payments, provided that such a solution would respect the provisions of the 1992 Civil Liability and Fund Conventions and in particular the principle of equal treatment of claimants. In the search for such an approach, inspiration was sought from previous decisions of the 1971 and 1992 Funds' governing bodies in the *Haven* and *Prestige* cases. The present document sets out a proposal by the Director as regards the principles of such an approach.

Action to be taken:

Decide the level of payments and consider the Director's proposal referred to above.

1 Review of the level of payments

- 1.1 At the Executive Committee's 28th session, held in March 2005, the French delegation requested the Director to refine the assessment of the overall losses arising from the *Prestige* incident by June 2005 to enable the Committee to take a decision on whether or not the level of payments could be increased.
- 1.2 The Director considers that although over two and half years have passed since the incident took place, it is nevertheless very difficult to estimate the overall impact of the pollution. The assessment of the claims representing the majority of the damage is still at an early stage due to the voluminous documentation involved and further documentation is required in respect of a large number of claims. Additionally, there are some 2 020 claims presented in the proceedings before the Criminal Court in Corcubi3n (Spain) which have not been presented to the 1992 Fund, although it is expected that most of these will be withdrawn as a result of the compensation paid to the claimants by the Spanish Government. Further claims may also be presented before the three-year time bar period expires.

- 1.3 Notwithstanding these factors, which make any estimates very uncertain, the Director considers that the best estimate that can be made at this stage of the total amount of admissible claims for pollution damage in the three States concerned is as follows:

State	Minimum	Maximum
Spain	€25 million ^{<1>}	€650 million ^{<2>}
France	€50 million	€85 million
Portugal	€2.6 million	€3.5 million
Total	€77.6 million	€738.5 million

- 1.4 The Director would like to point out however, that, on the basis of the figures presented by the Governments of the three States affected by the incident, the potential total claims may be as high as some €1 050 million (£720 million).
- 1.5 In accordance with the position taken by the IOPC Funds' governing bodies, the level of payments is to be determined in the light of the potential claims against the 1992 Fund and not on the basis of the Fund's assessment of the claims. In the light of this position and on the basis of the figures presented by the three Governments concerned and in view of the remaining uncertainties as to the level of admissible claims, the Director feels unable to propose at this stage an increase in the level of payments beyond 15% of the loss or damage suffered by the respective claimants.
- 1.6 It must be recognised that a payment level of 15% is manifestly unsatisfactory for claimants. As a result of the complexity of the case and the volume of the claims documentation, the assessment of the claims will take several years, and the pending court actions may make it even more difficult to establish with any degree of certainty the total of the admissible claims. There is a considerable risk that, if no action is taken to remedy the situation, the payment level will have to be maintained at 15% for several years. For this reason, the Director believes that attempts should be made to find an innovative approach which would make it possible to increase the level of payments, provided that any solution would have to respect the provisions of the 1992 Conventions and, in particular, the principle of equal treatment of claimants.

2 Meeting with the delegations of France, Portugal and Spain

- 2.1 In order to explore whether it would be possible to make progress towards an increase in the level of payments, the Director invited the French, Spanish and Portuguese delegations to a meeting in London which was held on 1 June 2005. At the meeting various options were considered.
- 2.2 At the meeting, the following points were noted:
- According to the Director's estimate, the total amount of admissible claims for pollution damage arising from the *Prestige* incident may be more than four times the amount available for compensation (cf paragraph 1.3).
 - The Spanish Government represents the great majority of claimants in Spain since it has undertaken to compensate all victims in Spain.
 - The French Government's claim for the costs of clean-up operations represents approximately 70% of the estimated total damage suffered in France.

<1> Cost of the removal of the oil from the wreck not included
 <2> Cost of the removal of the oil from the wreck included

- The Portuguese Government is the sole claimant as regards damage in Portugal.
 - These three delegations represent either directly or by subrogation the great majority of the victims of the pollution.
- 2.3 Having considered the estimate made by the Director of the total amount of admissible claims, the three delegations found that, irrespective of whether the maximum or minimum provisionally estimated amounts were considered as regards each affected State, the proportions of the damage between the three States remained substantially the same.
- 2.4 During the discussions at the meeting, the Director suggested that it would be preferable if a solution could be found which was inspired by previous decisions of the governing bodies of the 1971 and 1992 Funds. In this context reference was made to a decision by the 1971 Fund Executive Committee in the *Haven* case and a decision by the 1992 Fund Assembly in the *Prestige* case.
- 2.5 In the *Haven* case, the French Government's claim had been agreed at FFr12 580 724 and the accepted claims by 33 other public claimants totalled FFr10 659 469. The agreed amount of the French Government's claim was higher than the accepted amount of the other French public claimants' claims. The French Government offered to provide its approved claim as a security to enable the 1971 Fund to pay all other French claimants in full and gave the following undertaking:
- Should the full and immediate payment of compensation due to the 31 municipalities of the Var and Alpes Maritimes, to the Department of the Var (Direction départementale d'incendie et de secours) and to the Parc national de Port-Cros eventually result in an overpayment by the IOPC Fund, then the State would agree to a reduction of the compensation to which the State would be entitled up to the amounts overpaid to the other French victims.
- 2.6 The 1971 Fund Executive Committee instructed the Director to pay the claims presented by the 33 other public claimants in full on the basis of the French Government's undertaking (document FUND/EXC.47/14, paragraphs 3.1.10 - 3.1.13).
- 2.7 It was considered at the meeting on 1 June 2005 that in respect of the French claims an approach similar to the one adopted in the *Haven* case could be applied.
- 2.8 In the *Prestige* case, a precedent can be found in the decision of the 1992 Fund's Assembly, taken at its 8th session held in October 2003. In that decision the Assembly authorised the Director to make a payment of a significant amount to the Spanish Government (€7 555 000), subject to the Government providing a guarantee from a financial institution, not from the Spanish State, which would have the financial standing laid down in the 1992 Fund's Internal Investment Guidelines so as to protect the 1992 Fund against an overpayment situation (documents 92FUND/A.8/30, paragraph 20.29 and 92FUND/EXC.29/4, paragraph 10.2).
- 2.9 As regards Spain and Portugal, in order to meet the concerns previously expressed by some delegations (see paragraph 4.4 below), it was considered that, in addition to the provision of bank guarantees, payments should only be made on the basis of an assessment, provisional or final, of claims.

3 Director's proposal

- 3.1 In order to enable the 1992 Fund to increase the level of payments and to speed up payments of compensation to victims, the Director, after discussions with the delegations of France, Portugal and Spain, proposes that the Executive Committee examines the following approach which is based on an increase in the level of payments and a guarantee by each State against overpayment.

- 3.2 At the meeting, the three delegations recognised that the maximum amount payable by the 1992 Fund was 135 million SDR minus the limitation amount applicable to the *Prestige*, ie approximately €148.7 million (£102 million).

Provisional apportionment between the three States of the maximum amount payable by the 1992 Fund

- 3.3 It is proposed that the Director should be instructed to make a refined provisional estimate of the total amount of the admissible claims arising from the incident for pollution damage in each of the three States concerned. It is further proposed that, on that basis, the Director should assess provisionally the proportion of the admissible claims for damage in respect of each of these States in relation to the estimated total amount of admissible claims in respect of all three States and submit a proposal to the Executive Committee on a provisional apportionment between these three States of the maximum amount payable by the 1992 Fund. The Committee would then take a decision on such an apportionment.

Level of payments and guarantees provided by the States

- 3.4 It is proposed that, on the basis of a more refined provisional assessment to be carried out by the Director of the total amount of the admissible claims in respect of the damage in each of the three States concerned, the Executive Committee would decide whether the level of payments could be increased and, if so, decide the new level of payments, subject to guarantees against overpayment as set out below. Should the Committee decide to increase the level of payments, it is suggested that progress could be made as set out in paragraphs 3.5 – 3.15.

Spain

- 3.5 The Spanish Government would undertake to compensate all claimants who have suffered pollution damage in Spain for amounts no less than those that would be arrived at by applying the level of payments established by the Executive Committee, if the Government has not already done so.
- 3.6 The 1992 Fund would pay to the Spanish Government an amount corresponding to the proportion established by the Executive Committee for provisional distribution for damage in Spain of the maximum amount payable by the Fund.
- 3.7 In order to protect the 1992 Fund against overpayment, the Spanish Government would undertake to repay to the Fund any amount due by it to the Fund if the Executive Committee were to decide to reduce the proportion payable by the Fund for damage in Spain or to reduce the level of payments.
- 3.8 The Spanish Government would provide the 1992 Fund with a bank guarantee to protect the Fund against overpayment.

Portugal

- 3.9 The 1992 Fund would pay to the Portuguese Government an amount corresponding to the proportion established by the Executive Committee for provisional distribution for damage in Portugal of the maximum amount payable by the Fund.
- 3.10 In order to protect the 1992 Fund against overpayment, the Portuguese Government would undertake to repay to the 1992 Fund any amount due by it to the Fund if the Executive Committee were to decide to reduce the proportion payable by the Fund for damage in Portugal or to reduce the level of payments.
- 3.11 The Portuguese Government would provide the 1992 Fund with a bank guarantee to protect the Fund against overpayment.

France

- 3.12 The 1992 Fund would pay to each claimant who has suffered pollution damage in France, except the French Government, an amount arrived at by applying the level of payments established by the Executive Committee to the loss or damage as assessed by the 1992 Fund or as decided by a final judgement rendered by a competent court. However, the total amount payable by the 1992 Fund in respect of pollution damage in France would not exceed the proportion of the total amount payable by the Fund as regards damage in France.
- 3.13 In order to protect the 1992 Fund against overpayment, the French Government would undertake to accept a reduction in the compensation to which it would be entitled for its claim if the Executive Committee were to decide to reduce the proportion payable by the Fund for damage in France or to reduce the level of payments.

Bank guarantees

- 3.14 The bank guarantees to be provided by the Spanish and Portuguese Governments should be given not by the State, but by a financial institution which would have the financial standing laid down in the 1992 Fund's Internal Investment Guidelines.

Final apportionment between the three States of the maximum amount payable by the 1992 Fund

- 3.15 Once all claims arising from the incident have been settled, whether as a result of agreements with the claimants or as a result of final judgements by a competent court, the Director would inform the Executive Committee of the total amount of admissible claims in the three States concerned. The Committee would then decide, taking into account the distribution of the shipowner's limitation fund deposited with the Criminal Court in Corcubión (Spain) as decided by the courts, on any reapportionment between the three States concerned of the total amount payable by the 1992 Fund. The Committee would make the necessary adjustments so that the correct proportion of the total amount of compensation available under the 1992 Civil Liability Convention and the 1992 Fund Convention is received in respect of each of the three States, if required invoking the guarantees provide by these States.

4 Analysis of the proposed approach

- 4.1 The Director is of the view that the approach proposed above is in conformity with the 1992 Civil Liability and Fund Conventions.
- 4.2 The approach contains the basic principles of a possible solution to the problem created by the unsatisfactory low level of payment. If the Committee were to approve this approach, the Director intends to examine, in consultation with the three delegations, the legal and technical aspects involved and submit a detailed proposal to the Committee for consideration at its October 2005 session.
- 4.3 The Director considers that the bank guarantees to be provided by the Spanish and Portuguese Governments and the undertaking to be provided by the French Government would protect the 1992 Fund against overpayment.

Assessment of claims

- 4.4 During the discussions in the Assembly at its October 2003 session, a number of delegations expressed hesitation as to the appropriateness of the decision to authorise the Director to make a payment of a significant amount (€7 555 000) to the Spanish Government (cf paragraph 2.8 above). The hesitation of some delegations appears to have been due mainly to the fact that an additional payment was to be made, not in respect of an assessed claim but on the basis of a general assessment of the total damage in Spain.

- 4.5 The Director recognises that the proposed approach would involve an apportionment of the amount available for compensation between the three States on the basis of an estimate, at the time of the Executive Committee's decision, of the total amount of admissible claims and not on a final assessment of individual claims.
- 4.6 Although final assessments have yet to be made on most of the claims, the Director considers that the concerns referred to in paragraph 4.4 would be met. The information received and the analyses carried out since October 2003 show that the total amount of the admissible claims will exceed by far the total amount available for compensation under the 1992 Conventions. There is no doubt, therefore, that the 1992 Fund will pay the entire amount available in compensation to the victims. It is recognised that using estimates of the amounts of admissible claims in each State to make a provisional apportionment, rather than using individual assessments, may result initially in an incorrect distribution of the amount available for compensation between the three States. The final apportionment will, however, correct any errors in this regard.

Question of whether the 1992 Fund would act as a bank

- 4.7 During the discussion in the Executive Committee prior to the Assembly's October 2003 session, some delegations had expressed concern about the Fund appearing to act as a bank since it had never been intended to operate in that way.
- 4.8 The Director believes that at this stage, where the assessments of claims is more advanced than in October 2003, payments in accordance with the proposed approach could not result in the Fund being considered as acting as a bank.

Principle of equal treatment of claimants

- 4.9 During the deliberation in the Assembly in October 2003 some delegations expressed the view that the proposed decision had defects as regards the equal treatment of claimants and could lead to payments being made in respect of inadmissible claims.
- 4.10 At its 8th session, in October 2003, the Assembly of the 1992 Fund discussed the principle of equal treatment of claimants. In response to a question, the Director stated that according to his reading of Article 4.5 of the 1992 Fund Convention, the requirement for equal treatment only referred to the final result of claims settlements as opposed to the settlement process. He also expressed the view that Article 18.7 gave the Assembly wide ranging powers regarding the terms and conditions according to which provisional payments in respect of claims could be made with a view to ensuring that victims of pollution damage were compensated as promptly as possible, provided that Article 4.5 was not violated. He added, however, that the notion of equal treatment could be given a wider meaning to the effect that not only should the final result give equal treatment but also the claimant's rights during the assessment period.
- 4.11 In the Director's view, for the purpose of the discussion in this document, there are two groups of claimants, namely the three Governments concerned (France, Spain and Portugal), on the one hand, and other claimants (private individuals, businesses, local or regional authorities), on the other.
- 4.12 The principle of equal treatment laid down in the Conventions applies to all claimants. However, claimants are entitled to renounce their rights in this respect for the benefit of other claimants.
- 4.13 The Director considers that, in conformity with the views set out in paragraph 4.10 above, the Executive Committee could exercise the authority delegated to it by the Assembly regarding the terms and conditions according to which provisional payments in respect of claims can be made with a view to ensuring that the victims of the pollution damage are compensated as promptly as possible. In his view, the provisions of Article 4.5 would not be violated, since the final compensation would be paid to all victims of pollution damage on the basis of an assessment of every claim (or group of claims) on the basis of the criteria adopted by the 1992 Fund's governing bodies.

Director's proposal

- 4.14 In the light of the considerations set out above, the Director proposes that the Executive Committee should approve the suggested approach in principle and instruct him to make a detailed proposal, after consultations with the three delegations concerned, covering the legal and technical aspects to be considered by the Committee at its October 2005 session.

5 Action to be taken by the Executive Committee

The Executive Committee is invited:

- (a) to take note of the information contained in this document;
 - (b) to consider the level of payments (cf paragraph 1.5);
 - (c) to consider the proposal set out in Section 3; and
 - (d) to give the Director such instructions in respect of matters dealt with in this document as it may deem appropriate.
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